Supreme Court, U.S.
FILED
JAN 14 1991
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-759

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CLARENCE E. CRAYTON, et al.,
Petitioners,

vs.

PRICHARD HOUSING AUTHORITY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT PRICHARD HOUSING AUTHORITY IN OPPOSITION

MICHAEL A. FIGURES,
Counsel of Record
FIGURES, JACKSON & HARRIS
2317 Saint Stephens Road
Mobile, Alabama 36617
(205) 456-9922

Attorneys for Respondent
Prichard Housing Authority

QUESTIONS PRESENTED

I. Did the Court of Appeals correctly decide the issues involved in this case on the basis of settled applicable decisions of this Court and the decisions of courts of appeals?

II. Does this case involve a federal question which has not been settled by this Court of such exceptional importance as to warrant review by certiorari?

PARTIES

The full listing of the parties in this case taken from the caption of the pleadings is as follows:

A. Petitioners:

Clarence E. Crayton, Willie Mae Crayton and Edrice C. Rivers.

B. Respondents:

Prichard Housing Authority[1], The City of Prichard[2], and Richard Compton, as Director of Housing and Urban Development.

---

[1]Respondent, Prichard Housing Authority was incorrectly designated in the plaintiffs' complaint. The correct designation is Housing Authority of the City of Prichard.

[2]The City of Prichard was dismissed from this action by stipulation.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Statutes	2
Statement of the Case	2
Summary of the Argument	7
Reasons Why The Petition Should Be Denied	9
I. The Issues Involved In This Case Were Decided On The Basis Of Settled Applicable Decisions Of This Court And The Decisions Of Courts Of Appeals And Not In Conflict With Same	9
A. The Court Of Appeals Correctly Concluded That The Housing Authority's Decision To Reject Petitioners' Proposal To Participate In A Federally Funded Housing Program Was Not Arbitrary And Capricious	9

B. The Court Of Appeals Applied The Correct Standard Of Review In Upholding The District Court's Determination That Petitioners Have No Private Right Of Action Enforceable Under The National Housing Act And Could Not Maintain Their Action 13

C. The Petitioners Lacked Standing To Pursue Their Due Process Claims Because They Have No Property Interest Nor Any Right To Participate In A Federally Funded Housing Assistance Program 16

II. This Case Does Not Involve An Important Federal Question Which Has Not Been Settled By This Court, Is Not Of Such Exceptional Importance As To Warrant Review By Certiorari, And The Court Of Appeals' Decision Does Not Conflict With This Court's Decisions 19

Conclusion 20

Appendix A-1

TABLE OF AUTHORITIES

Cases: **Page**

Association of Data Processing Service Organizations, Inc. v. Camp,
397 U.S. 150, 153; 90 S. Ct. 827, 830;
25 L. Ed. 2d 184 (1970)..... 16

Board of Regents of State Colleges v. Roth,
408 U.S. 564 (1970) 92 S. Ct. 2701..... 16, 18

Cedar-Riverside Associates, Inc. v. Minneapolis,
606 F. 2d 254 (8th Cir. 1979)..... 15

Citizens to Preserve Overton Park v. Volpe,
401 U.S. 402; 91 S. Ct. 814 (1971)..... 11

Cort v. Ash,
422 U.S. 66; 95 S. Ct. 2080 (1975)..... 14, 15

Eidson v. Pierce,
745 F. 2d 453 (7th Cir. 1984)..... 17, 18

Goldberg v. Kelly,
397 U.S. 254; 90 S. Ct. 1011 (1970)..... 18

Guran Co., Inc. v. City of Akron, et al.,
546 F. 2d 201 (6th Cir. 1976)..... 14, 15

Hornsby v. Allen,
326 F. 2d 605 (5th Cir. 1984)..... 19

Moses v. Banco Mortgage Company,
778 F. 2d 267 (5th Cir. 1985)..... 16

National Citizens Commission for Broadcasting v. F.C.C., 555 F 2d. 938 (D.C. Cir. 1977), aff'd in relevant part, reversed on other grounds, *F.C.C. v. National Citizens Commission for Public Broadcasting*, 436 U.S. 775; 98 U.S. 2096 (1978) 11, 13

Perry v. Sinderman, 408 U.S. 593, 92 S. Ct. 2694 (1972) 18

Roberts v. Secretary, Department of Housing and Urban Development, 473 F. Supp. 52 (N.D. Miss. 1979) 10, 12, 13

United States v. Larionoff 431 U.S. 864; 97 S. Ct. 2150 (1977) 13

Constitutional Provisions:

Fifth Amendment to the United States Constitution 17

Statutes:

42 U.S.C. Section 1437f 3

42 U.S.C. Section 1983 17

Miscellaneous:

24 C.F.R. 882.504(a) (1987) 4, 10

24 C.F.R. 882.504(c) (1987) 4, 13

24 C.F.R. 109(h) (1987)..... 10

24 C.F.R. 109(k) (1987)..... 10

11th Cir.R. 36-1..... 1

No. 90-759

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CLARENCE E. CRAYTON, et al.,
Petitioners,

vs.

PRICHARD HOUSING AUTHORITY, et al.,
Respondents.

BRIEF OF RESPONDENT PRICHARD HOUSING AUTHORITY IN OPPOSITION

OPINIONS BELOW

The opinion of the district court, styled as follows, *Clarence E. Crayton, et al., v. Prichard Housing Authority, et al.*, DKT NO. 87-0576-B, was filed and entered on April 5, 1989, Judgment Entry No. 6091, in the records of the clerk for the United States District Court for the Southern District of Alabama, Southern Division.

The opinion of the United States Court of Appeals for the Eleventh Circuit, No. 89-7375, was entered per curiam on April 30, 1990 pursuant to Eleventh Circuit Rule 36-1 as a non-published opinion. Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc was denied per curiam on August 3, 1990.

STATUTES

The relevant rules, statutes and regulations, which are set forth verbatim in the Appendix hereto, are as follows:

1. Fifth Amendment, United States Constitution.

2. 42 U.S.C. Section 1983.

3. 24 C.F.R. 882.504(a) (1987).

4. 24 C.F.R. 882.504(c) (1987).

5. 24 C.F.R. 109(h) (1987).

6. 24 C.F.R. 109(k) (1987).

7. 11th Cir.R. 36-1.

STATEMENT OF THE CASE

The petitioners, plaintiffs below, Clarence E. Crayton, Willie Mae Crayton and Edrice Rivers (the daughter of the Craytons), filed this action in the Circuit Court of Mobile County against the Prichard Housing Authority ("Housing Authority"), Richard Compton, as Director of Housing and Urban Development, and the City of Prichard. The United States of America on behalf of its agency, The United States Department of Housing and Urban Development ("HUD"), filed a petition in the District Court for removal.

The Housing Authority of the City of Prichard ("Housing Authority") is a corporation formed under the laws of the State of Alabama. It is administered by a Board of Commissioners. Charles Pharr is the Executive Director.

The Housing Authority administers, inter alia, a program known as the Section 8 Moderate Rehabilitation Program which is funded by the U.S. Department of Housing and Urban Development ("HUD") whose Regional Director, Richard Compton, was sued in his official capacity. The Moderate Rehabilitation Program was created by Congress in 1978 by amendment to the United States Housing Act of 1937, 42 U.S.C. Section 1437 f. It is designed to achieve three major objectives:

a. To upgrade substandard housing and provide rental subsidy to low and moderate income families.

b. To preserve and revitalize Community Development Areas...and to compliment development efforts in these neighborhoods.

c. To provide improved living conditions for low and moderate income families while maintaining their housing costs at an affordable level.

(R-Vol. 1, PHA Exh. 1,2 to Doc. #29)

The Housing Authority solicited proposals from owners of rental property in the City of Prichard in the Spring of 1984 for participation in the program. One hundred fifty (150) rental units were allotted to the Housing Authority for placement in the program by HUD. (R-Vol. 1, PHA, Exh. 1, to Doc. #29, P. 1)

Proposals were submitted on approximately four hundred fifty (450) units and each owner who responded to the solicitation for proposals was provided an Owner's Packet

which included the required contents of the owner's proposals and gave a general description of the criteria to be used in evaluating, ranking and selecting eligible proposals. Proposals on approximately 200 of the units submitted that met basic threshold criteria were ranked.

The criteria described in the Administrative Plan and/or the Owner's Packet pertinent to this case are the following:

a. The amount of rehabilitation to be accomplished, with the highest points awarded for the most rehabilitation.[1]

b. Consideration of environmental and/or historic preservation requirements.

The petitioners submitted proposals to place approximately 89 rental units under the Program. All of petitioners' units were in a subdivision known as the Prichard Homes Subdivision. (R. Vol. 1, PHA Exh. 8 to Doc. #29, Crayton Deposition. P. 33).

The Housing Authority notified the petitioners and all other owners who submitted proposals on properties in the Prichard

---

[1]HUD requires that preference be given to those proposals reflecting the most rehab per unit, see 24 C.F.R. Section 882.504(c)(4)(1987)(App. at A-4).

Owners selected to participate in the Section 8 Moderate Rehabilitation Program contract with the Housing Authority whereby they are guaranteed lease payments on behalf of eligible tenants of their units for a 15 year period. These payments include funds to reimburse the owners for out of pocket expenditures made to rehabilitate the properties. (R.Vol. 1, Exh. 2, Doc. #29).

Homes Subdivision by certified mail that it was not "accepting properties located in the Prichard Homes area, as it has been determined that existing conditions [involving the water and sewer system] violate program regulations and pose a threat to the health and safety of residents." The letter further advised petitioners that they could request an informal hearing regarding the decision and told them that "the City of Prichard and the Housing Authority, in conjunction with other federal and state agencies, are proposing a comprehensive redevelopment plan for the area to improve existing conditions." (R-Vol. 1, PHA Exh. 3 to Doc. #29). None of petitioners' proposals was deemed to have met threshold eligibility requirements for these reasons, and, therefore, not ranked, initially. (R-Vol. 1, PHA Exh. to Doc. #29 and Pharr Deposition, P. 68-69).

Shortly afterwards, petitioners requested a hearing before the Housing Authority's Board of Commissioners. Petitioner Clarence Crayton, on behalf of all petitioners, appeared before the Board of Commissioners seeking reconsideration of the decision regarding their proposals. Subsequent to the hearing, Charles Pharr, Executive Director of the Housing Authority, notified petitioners in writing that the Commissioners upheld their initial decision not to accept the proposals submitted by the petitioners on Prichard Homes properties. (R.Vol. 1, PHA Exh. 5 to Doc. #29).

Petitioners take the position that upon the Housing Authority determining that it would not fund any of the proposals for the Prichard Homes area, "...the whole examination should have been cancelled and do the thing over, if you was going to be fair with me," even though the Housing Authority had more than enough qualified proposals outside of the Prichard Homes area to fill its 150 unit allotment under the Program. (R.Vol. 1; Crayton Deposition, Pgs. 32-36; 54-59 attached to Doc. #29).

When asked, whether he was claiming that the Housing Authority had no basis for the denial of their proposals, petitioner Clarence Crayton responded, "I don't - I don't agree with the reasons they gave." (R-Vol. 1, Crayton Deposition, P. 58, attached to Doc. #29). He later stated that the reason given by the Housing Authority was not true because he already had units funded under other programs in the Prichard Homes area and...they [tenants] wasn't suffering any..." (Crayton Deposition, P. 59, attached to Doc. #29).

More than a year later the Housing Authority reclaimed some Moderate Rehabilitation Program funds from an owner who had been selected to participate but who died before completing his contract obligations. It used this money to fund four units in the Prichard Homes Subdivision owned by William Clark, after a commitment had been made by the City of Prichard, HUD and The Alabama Department of Economic and Community Affairs ("ADECA") to redevelop the Prichard Homes area and correct the water and sewage problem and after a grant application seeking money to correct that problem had been approved for funding. A redevelopment plan was adopted by the City of Prichard reflecting this. (Appendix to record below, Doc. 7, P. 8, Agreed Fact #25 of Proposed Pre-trial Order). Clark's proposal, like all others in Prichard Homes, had not been accepted initially and before it was funded, all Prichard Homes proposals were ranked using the criteria described above and Clark's units ranked first which was never challenged by the petitioners. (R.Vol. 1, PHA Exh. 8 to Doc. #29).

Contrary to petitioners' statement on page 9 of their petition, Mr. Clark is not the State of Alabama Congressional Representative for the Prichard district but is a state Representative from Prichard serving in the Alabama

Legislature which has no relevance to the issues presented here. (R.Vol. 1, Doc. #35, Clark Deposition, P. 5, Appendix to record below Doc. #8 Clark Deposition, P. 8).

Mr. Clark is also a realtor and once served on the Housing Authority's Board of Commissioners. He left the Board in 1979 and has had no official association with it since. His proposals were submitted in 1985. (R-Vol. 1, Clark Deposition, P. 35 attached to Doc. #35, Appendix to record below, Doc. #8, Clark Deposition, P.8).

The Housing Authority also funded Moderate Rehabilitation units in a subdivision known as Alabama Village. A water and sewer problem existed there similar to the one that existed in Prichard Homes but not as severe. There was also no redevelopment planned for that area. (R-Vol. 1, Huggins Deposition, P. 36; Pharr Deposition, Pgs. 75-76, PHA Response to Interrogatory 10 all attached to Doc. #29).

Other Section 8 programs also operate in the Prichard Homes Subdivision such as the Rental Rehabilitation Program and the existing Section 8 program. These programs have a maximum one year lease with the owner as opposed to the 15 year lease arrangement under the Moderate Rehabilitation Program meaning that they create no investment in the area that is of a permanent nature. (Appendix to record below, Doc. #8, Pharr Deposition, P. 25).

SUMMARY OF THE ARGUMENT

I.
The Housing Authority Actions Were Not Arbitrary And Capricious.

The respondent, Housing Authority of the City of Prichard,

is vested with the legal discretion, subject to certain promulgated standards, to determine which owner-applicants are selected to participate in the Moderate Rehabilitation Program. It was acting within the scope of its discretion when it decided, initially, not to select any proposals submitted on properties within the Prichard Homes Subdivision. The Housing Authority's decision was based on the fact that an imminent health threat involving the water and sewer system existed there. To reject all applications because of this problem and deciding to become part of a joint effort with the City of Prichard, HUD, and the Prichard Water and Sewer Board to correct the problem and redevelop the area was in no way arbitrary and capricious.

Its subsequent decision to fund the highest ranked proposal for four units in the Prichard Homes area was also not arbitrary and capricious. It only did so after funds were reclaimed from an owner who was originally selected but who died before he could use them, and after a proposal to correct the water and sewer problem had been funded, a redevelopment plan had been adopted and after all proposals, including petitioners', were reviewed and ranked.

II.
Petitioners Have No Legally Enforceable Right.

The petitioners do not have a right of action under the National Housing Act, which authorizes the Moderate Rehabilitation Program, that is legally enforceable because they are not members of the special class for whose benefit the Program is intended.

III.
Petitioners Do Not Have Standing.

Petitioners cannot raise due process claims because they do not have a constitutionally protected property right entitling them to participate in the Moderate Rehabilitation Program. The administration of the Program is placed within the sound discretion of the Public Housing Authorities subject only to broad guidelines, standards and regulations promulgated by HUD.

Even tenants, who are the intended beneficiaries of these programs, do not necessarily have standing under the Federal Housing Act or HUD regulations. Certainly, owners do not. The Housing Authority's reasons for rejecting petitioners' units would have been valid even if petitioners had a constitutionally protected property right.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

The Issues Involved In This Case Were Decided On The Basis Of Settled Applicable Decisions Of This Court And The Decisions Of Courts Of Appeals And Not In Conflict With Same.

A. The Court Of Appeals Correctly Concluded That The Housing Authority's Decision Was Not Arbitrary And Capricious.

The Moderate Rehabilitation Program application and approval procedure used by the Housing Authority required that if an owner's proposal is evaluated and ranks high enough,

the two criteria noted on page 4 hereof and others having been met, the Authority must conduct an inspection as set forth in 24 C.F.R. Sections 882.109(h) & (k), 882.504 (1987)(App. at A-2,3) to determine whether the water supply at the site is free of contamination and whether the site and neighborhood are reasonably free from hazards to the health, safety and general welfare of the occupants. The regulation also specifically requires that "the site and neighborhood shall not be subject to serious adverse environmental conditions, natural or manmade, such as "sewage hazards" among others.

Ken Huggins, who is the Superintendent of the Prichard Water System, testified in his deposition that raw sewage had infiltrated the waterlines in the Prichard Homes area creating an imminent threat to the public's health and safety. An application for a grant to address the problem contains the following language in its needs assessment and strategy statement section:

> "The infiltration of raw sewage into waterlines as a result of the deteriorated conditions of the sewer lines has become an imminent threat to the public health and safety. Based on data from the Mobile County Health Department, Prichard experienced a 53% increase in the incident [sic] of salmonella/shigella between 1979 and 1980. In April of 1980, five members of one family living in Prichard Homes were stricken with Shigella due to flooding and sewage overflowing into the back yard of their home." (R-Vol. 1, P. 2 of PHA Exh. 7 to Doc. #29).

In *Roberts v. Secretary, Department of Housing and Urban Development,* 473 F. Supp. 52 (N.D. Miss., 1979), the standard of review for decisions that are alleged to have been made arbitrarily and capriciously is described as follows:

"A decision to be 'arbitrary and capricious' must be based on facts not supported by the record; however, factual certainty is not necessary, and an agency may regulate even though facts do not illuminate a clear path." id at 55, citing, *National Citizens Commission for Broadcasting v. F.C.C.*, 555 F. 2d 938 (D.C. Cir. 1977). Aff'd in part and reversed on other grounds, 436 U.S. 775, 98 S. Ct. 2096 (1978).

The court also states that "[u]nder the 'arbitrary and capricious' standard of review of agency action, the reviewing court is to search for clear error of judgment, but it cannot substitute its judgment for that of the agency." id at 54. Also see *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402-416; 91 S. Ct. 814,823(1971). The *Roberts* Court goes on to say that "[t]hese cases make plain that it is not for the reviewing Court to supply its own interpretations so long as the interpretation or determination applied by the agency was reasonable, even though that interpretation might not appear as reasonable as some others." *Roberts*, supra, at 54.

The testimony of petitioner, Clarence Crayton, cited supra at pages 5,6, when viewed in the legal context described above offers the clearest of reasons why the district court properly granted respondent's motion for summary judgment and why the court of appeals was correct in upholding that ruling.

Petitioners raise in their petition that a similar health problem may have existed in Alabama Village which is irrelevant for purposes of determining whether the Housing Authority's decision not to accept proposals on properties in the Prichard Homes area was arbitrary and capricious under the law. Consider also that the City of Prichard had a chance to obtain a limited amount of funding to correct the water and sewer problem and chose the Prichard Homes Subdivision because it was smaller, the property there was in a greater state of

deterioration than in Alabama Village and the water and sewer problem was not as bad. (R-Vol. 1, Huggins Deposition, Pgs. 35-36 attached to Doc. #28; Housing Authority's response to plaintiffs interrogatory, No. 10, Deposition of Charles Pharr, pgs. 75-76, PHA Exh. 6, attached to Doc. #29).

The decision to choose Prichard Homes over Alabama Village for the grant application and redevelopment effort and to place Moderate Rehabilitation monies in Alabama Village as opposed to Prichard Homes was a matter of discretion which was exercised soundly as the law allows agencies such as the Housing Authority, *Roberts v. HUD*, supra.

Petitioners also argue that a later decision to accept a proposal by William Clark to place four units in the Program located in the Prichard Homes area after some monies had been reclaimed somehow supports their position that the initial decision was arbitrary and capricious.[2] Clark's proposal, like all of the other Prichard Homes proposals, was initially rejected by the Housing Authority because of the water and sewer problem.

---

[2]Agreed fact No. 25 of the Pre-trial Order sets out the scenario that led to Clark receiving funding for four units in the Prichard Homes area.

"25. On or about the 1st day of August, 1986, the defendant, Housing Authority of the City of Prichard, reclaimed some Moderate Rehabilitation funds from an owner who had been selected, but [who] died before completing his obligations under the Moderate Rehabilitation Agreement. It used this money to fund four units in the Prichard Homes Subdivision owned by William Clark after a commitment had been made by the City of Prichard, HUD and The Alabama Department of Economic and Community Affairs to redevelop the Prichard Homes area and correct the water and sewage problem and after [a] grant application...had been resubmitted and approved by the City of Prichard reflecting this." (Appendix to record below, Doc. #7, P. 8).

Prior to funding the Clark proposal, all proposals that had been originally submitted on Prichard Homes properties were evaluated and ranked in accordance with the system described herein. Based on that system, Clark's proposal was rated the best of all those submitted. He proposed to spend more money to rehabilitate his units than any other owner who submitted a proposal for Prichard Homes properties, thus, entitling him to preference under 24 C.F.R. 882.504(c)(4)(App. at A-4) (1987). (R-Vol. 1, Doc. #29 PHA Exh. No. 8). Appellants have never challenged Clark's ranking nor those of other Prichard Homes proposals including their own at any point during these proceedings.

Petitioners must show that under no interpretation of the applicable rules, regulations and circumstances were the Housing Authority's actions reasonable or rational and that its decision was not based on a consideration of relevant factors, *F.C.C. v. National Citizens Commission for Broadcasting*, supra, 98 S. Ct. at 2116. The decision of the Housing Authority must be accorded "controlling weight unless it is plainly erroneous or inconsistent with the regulations." *Roberts v. HUD*, supra, at 55, citing *United States v. Larionoff*, 431 U.S. 864, 97 S. Ct. 2150 (1977).

B. The Court Of Appeals Applied The Correct Standard Of Review In Upholding The District Court's Determination That Petitioners Have No Private Right Of Action Enforceable Under The National Housing Act And Could Not Maintain Their Action.

Petitioners have asserted throughout the course of these proceedings that they are not making a claim based on the National Housing Act, even though the subject Program is authorized by that Act. They apparently hope to avoid the

problems that this act presents for them.

The Sixth Circuit Court of Appeals in *Guran Co., Inc., v. City of Akron, et al.*, 546 F. 2d 201 (6th Cir. 1976) squarely addressed this issue. Rejecting a contractor's contention that he had a federally protected right to a contract on which he was the low bidder, the court stated the following:

> "In analyzing the Housing Act, we note the expression of Congressional interest that private industry be encouraged to participate to the fullest extent and that the housing industry's involvement will thereby contribute to a strong national economy, 42 U.S.C. 1441. However, the class for "whose especial benefit the statute was enacted" must be the persons who inhabit inadequate housing. We deem the central purpose of the Housing Act to be "the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family..." id at 204.

Determining that a federal right of action will not be implied from an alleged violation of federal law, the court relied on *Cort v. Ash*, 422 U.S. 66; 95 S. Ct. 2080 (1975), which sets out the test to determine when a plaintiff has a private right of action that will be implied from a violation of federal law.

> "First, is the plaintiff one of the class for whose especial benefit the statute was enacted,...that is, does the statute create a federal right in favor of the plaintiff?"

"Second, is there any indication of legislative intent, also explicit or implicit, either to create such remedy or to deny one?"

"Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?"

"Finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?"

Cort v. Ash, supra, at 78, 95 A. Ct. at 2088.
Guran v. City of Akron, supra, at 204.

The issue was also addressed in *Cedar-Riverside Associates, Inc., v. Minneapolis*, 606 F. 2d 254 (8th Cir. 1979). There the court of appeals held that the complaint, alleging that the defendants breached their statutory obligation to comply with the national housing policy established in the National Housing Act of 1937 (claiming that the failure to follow established housing policy interfered with their contractual relations), failed to state a claim upon which relief could be granted, since the National Housing Act did not create a private cause of action for violation of such statutory obligation.

"...we determine first that appellants do not belong to a class for whose especial benefit Congress enacted the Housing Act. If Congress intended the Housing Act to benefit any particular class of persons, that class must be the inhabitants of inadequate housing, not private developers of housing projects." *id.*, p. 257.

The petitioners have no rights under the National Housing Act that are enforceable.

C. The Petitioners Lacked Standing To Pursue Their Due Process Claims Because They Have No Property Interest Nor Any Right To Participate In A Federally Funded Housing Assistance Program.

The law respecting federally protected property rights is clear. To establish such a right in this case, petitioners must show that they have a "legitimate claim of entitlement" to participate in this federally funded housing assistance program. They "must have more than an abstract need or desire for a government benefit...must have more than the unilateral expectation of it. *Board of Regents of State Colleges v. Roth*, 92 S. Ct. 2701, 2709; 408 U.S. 564, 577 (1970). Never has a court held that an owner has a "legitimate claim of entitlement" to participate in a federally funded housing assistance program but, rather, the opposite has universally obtained.

The Fifth Circuit addressed the issue of standing in *Moses v. Banco Mortgage Company*, 778 F. 2d 267 (5th Cir. 1985) under similar facts. The court held that owners of low income properties nor bidders at a HUD mortgage auction had standing under the Federal Housing Act. The language used by the court has particular application here,

> "A party will fall within the zone of interests if he is a member of a class of persons who was intended to be benefited by the statute or regulation. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 830, 25 L. Ed. 2d 184 (1970).

> Conversely, parties who receive only unintended or incidental benefits from statutes or regulations are outside the zone of interests to be protected, and thus lack standing to sue. We hold that neither the Federal Housing Act nor the HUD regulation was intended directly to benefit either owners of low income housing projects or parties bidding at the HUD mortgage auction." id at 271.

> "If investors, [like petitioners] are to fall within the zone of protection of any provision of the statute, it must be specifically found that they are intended beneficiaries of the particular statute..." id at 272.

Petitioners, in the present case, lacked standing as the district court and court of appeals properly concluded.

In *Eidson v. Pierce*, 745 F. 2d 453 (7th Cir. 1984), the court dealt with the question of whether the plaintiffs, who had applied for participation in a Section 8 existing housing program as tenants and who were eligible for participation had a "legitimate claim of entitlement" to the benefits before they were accepted as tenants by a private owner. Under the particular Section 8 sub-program at issue, owners were given the right by HUD regulations to select their tenants from a pool of eligible applicants. The plaintiffs were rejected from participation because the owners did not deem them to be suitable tenants. They sued the owners or their agents and HUD relying on 42 U.S.C. 1983 and on the Fifth Amendment.

The Seventh Circuit held that not even low-income tenant applicants have a claim of entitlement to public housing even though they were eligible for it. The court said that "Section 8 is...not a simple entitlement program" such as a public welfare benefit program of the type that was the subject of the

landmark decision in *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1070). "In *Goldberg*," as the court notes, "and numerous other public benefit cases, the law established eligibility criteria, and any person who satisfied those factual criteria was entitled to the benefits." id at 461.

The court in *Eidson*, supra, also makes two other important observatons. First, there is nothing in the Section 8 law to suggest that Congress intended for potential tenants to have enforceable rights to Section 8 housing in particular projects. It also noted that "Section 8 entitlements depend on discretionary judgments which, in some respects are not constrained by any legal criteria." The court explains that latter statement as follows:

> "The problem in this case is that an owner's judgment about a tenant's acceptability is not constrained by any legal criteria under Section 8. The statute, regulations and contracts suggest information that might be relevant, but they provide no guidance in weighing that information. Instead, the matter is left entirely to the owner's business judgment." id at 463.

This rationale should especially apply for due process purposes where, as here, the property fails to meet a basic eligibility criteria in the judgment of the administering agency.

Petitioners cannot properly raise due process claims because they do not have a property interest. They merely have an expectancy, an abstract need or desire but do not have a "legitimate claim of entitlement." *Board of Regents v. Roth*, supra. The right to a valuable governmental benefit can be denied for any number of reasons that do not infringe on a constitutionally protected right. *Perry v. Sinderman*, 408 U.S.

593; 92 S. Ct. 2694(1972). The reasons used by the Housing Authority were completely valid and would have been sufficient even if petitioners did have a constitutionally protected property right to participate in the Moderate Rehabilitation Program.

Appellants cite *Hornsby v. Allen*, 326 F. 2d (5th Cir. 1984) in principal support of its position but that case seems so far off point that it merits no serious response.

II.

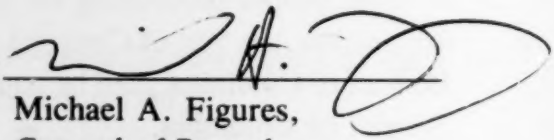
This Case Does Not Involve An Important Federal Question Which Has Not Been Settled By This Court, Is Not Of Such Exceptional Importance As To Warrant Review By Certiorari And The Court Of Appeals' Decision Does Not Conflict With This Court's Decisions.

Although petitioners make the assertion in their petition that this case is of such exceptional importance that it warrants review by certiorari, they offer nothing in support of it. The cases cited in the preceding section of this brief clearly show that any federal questions raised have been fully addressed by district courts, courts of appeals and settled by this Court. The decision of the district court and court of appeals below are consistent with the settled law and there is simply nothing so exceptionally important about this case so as to warrant review by this Court.

CONCLUSION

The court of appeals correctly concluded that the district court's order of summary judgment in favor of the respondents was supported by the record. The petitioners have no constitutionally protected property right and, therefore, have no standing to pursue a violation of same in federal court. Even if they had such a right, the action of the respondent Housing Authority of the City of Prichard, was proper in all respects and was in no way arbitrary and capricious.

Respectfully submitted,

BY: 

Michael A. Figures,
Counsel of Record
Figures, Jackson & Harris
2317 Saint Stephens Road
Mobile, Alabama 36617
(205) 456-9922

42 U.S.C. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

11th Cir.R. 36-1 Affirmance Without Opinion

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without an error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

24 C.F.R. 882.109 Housing quality standards

Housing used in this program shall meet the Performance Requirements set forth in this section. In addition, the housing shall meet the Acceptability Criteria set forth in this section except for such variations as are proposed by the PHA and approved by HUD. Local climatic or geological conditions or local codes are examples which may justify such variations.

(h) Water Supply.-(1) *Performance Requirement.* The water supply shall be free from contamination.

(2) *Acceptability Criteria.* The unit shall be served by an approved public or private sanitary water supply.

(k) Site and Neighborhood.-(1) *Performance Requirement.* The site and neighborhood shall be reasonably free from disturbing noises and reverberations and other hazards to the health, safety, and general welfare of the occupants.

(2) *Acceptability Criteria.* The site and neighborhood shall not be subject to serious adverse environmental conditions, natural or manmade, such as dangerous walks, steps, instability, flooding, poor drainage, septic tank back-ups, sewage hazards or mudslides; abnormal air pollution, smoke or dust; excessive noise, vibration or vehicular traffic; excessive accumulations of trash; vermin or rodent infestation; or fire hazards.

24 C.F.R. 882-504 Assistance to owners and selection of units.

(a) *Initial inspection.* For all proposals selected for further processing, the PHA must inspect the property. A determination must be made by the PHA as to the specific work items which need to be accomplished to bring the unit(s) to be assisted up to the Housing Quality Standards specified in Sections 882.109 and 882.404 (or other standards as approved in the PHA's application) or to repair or replace major building systems or components in danger of failing.

(c) Selection of Proposals. After the initial inspection and preliminary feasibility analysis, the PHA should select among Owner proposals those proposals which it will approve. The PHA must establish a method of selecting among Owner proposals and must make this method known to any Owner submitting or planning to submit a proposal. Proposals must be approved in accordance with criteria established by the PHA and approved by HUD, and in accordance with the following requirements:

(1) No proposal found infeasible by the PHA in the preliminary feasibility analysis may be approved unless the Owner can demonstrate that the allowable rent will be sufficient to rehabilitate, manage and maintain the unit(s) adequately;

(2) If, during the preliminary feasibility analysis, it is determined by the PHA that the work necessary to bring a unit(s) to the Housing Quality Standards, or other standards approved for the Program, or to repair or replace major systems is not sufficient to meet the $1000 per unit minimum amount of rehabilitation requirement, that unit(s) may not be assisted under the Program.

(3) If a unit(s) does not meet the requirement or paragraph (c)(2) but the Owner is proposing to accomplish at least $1000 per unit of rehabilitation by including work to make the unit(s) accessible to a handicapped or disabled individual occupying the unit(s) or expected to occupy the unit(s), the PHA may approve such units not to exceed 5 percent of the units under its Program, provided that accessible units are necessary to meet the requirements of 24 C.F.R. Part 8, which implements Section 504 of the Rehabilitation Act of 1973. The rehabilitation must make the unit(s), and access and egress to the unit(s), barrier-free with respect to the handicap or disability of the individual in residence or expected to be in residence.

(4) A preference must be provided to those proposals which indicate in the preliminary feasibility analysis the greatest dollar amount of necessary rehabilitation per unit.

(5) Prior to the approval of any unit(s) owned by a State or unit of general local government, the PHA must contact HUD and request HUD review of the site. The PHA may not enter into an Agreement on any such unit(s) until HUD approval of the site is obtained and the State or unit of general local government has sold the unit(s) to another Owner.